Boise Cascade Corporation, Specialty Paperboard Division *and* United Paperworkers International Union, AFL-CIO and its Local 926. Case 3-CA-9633

August 17, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS ZIMMERMAN AND HUNTER

On September 30, 1981, Administrative Law Judge David L. Evans issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions and a brief in support of cross-exceptions and in reply to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge: This case was heard before me at Watertown, New York, on May 28, 1981. The charge was filed by United Paperworkers International Union, AFL-CIO and its Local 926, herein called the Union, on March 4, 1980.[1] The complaint was issued against Boise Cascade Corporation, Specialty Paperboard Division, hereinafter referred to as Respondent, alleging violations of Section 8(a)(5) and (1) of the National Laoor Relations Act, herein called the Act, by certain admitted unilateral actions taken on February 26. Respondent filed an answer denying violating the Act and moves to dismiss the instant matter on the grounds that the subject complaint has been disposed of by an arbitration decision which issued on August 13. The General Counsel and the Charging Party[2] reply that the Board should not defer to the arbitration decision because the result is repugnant to the Act and does not therefore meet one of the criteria for deferral announced by the Board in its *Spielberg* decision.[3]

Upon the entire record, and after due consideration of the briefs filed by the General Counsel, the Charging Party, and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a division of Boise Cascade Corporation, is and has been at all times material herein a corporation duly organized under, and existing by virtue of, the laws of the State of Delaware. At all times material herein, Respondent has maintained a facility at Beaver Falls, in New York, herein called the Beaver Falls plant, where it is engaged in the manufacture, sale, and distribution of specialty paperboard. Annually Respondent, in the course and conduct of its business operations, purchases, transfers, and delivers to its Beaver Falls location goods and materials valued in excess of $50,000 which goods and materials are transported to said plants directly from States of the United States other than the State of New York. The complaint alleges, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent (or its predecessors at the Beaver Falls plant) had recognized the Union as the collective-bargaining representative of its production and maintenance employees since 1959. The parties stipulated that, on February 26, Respondent, without prior notice to or bargaining with the Union: (a) abolished 12 jobs by eliminating three job classifications; namely, the fourth hand on the cylinder machine, saturator, and fourdrinier, and laid off one beater helper on each of its three shifts; (b) combined the duties of the abolished jobs and the laid-off beater helpers with those of existing job classifications; (c) set a new wage rate for the created job classifications; and (d) created a new job classification of utility helper and set the wage rate and working conditions for that classification. The parties further stipulated that these unilateral actions were done for economic reasons and not antiunion purposes.

On February 26, the Union filed a grievance challenging these actions and on August 13 arbitrator William Babiskin issued his award. The award was that Respondent violated the collective-bargaining agreement when it did not bargain with the Union as to the conditions of

[1] Unless otherwise specified, all dates herein are in 1980.

[2] The positions of the General Counsel and the Charging Party are identical on all issues; for the sake of brevity I shall refer to the proponents of the complaint as the General Counsel.

[3] *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).

employment for the newly created utility person classification, but the balance of the grievance was denied.

Revelant sections of the contract in existence at the time of the unilateral actions are:

SECTION XXIV—SCHEDULE OF WAGES

> The wage schedule shown on Exhibit "B" as attached and made a part of this Agreement shall become effective July 1, 1979, and prevail during the remainder of the term of this agreement.
>
> All wages are determined by job evaluation. The job evaluation plan in effect establishes labor grades and each job is included in one of these labor grades. When a new classification is established or an existing classification undergoes a significant change in duties, the Company will establish a fair and equitable rate in accordance with the present job evaluation plan.
>
> All questions concerning new rates are subject to the grievance procedure as set forth in Section XXXI.

* * * * *

SECTION XXVIII—SENIORITY

> D.5 In the event a job or department is abolished, the displaced employee may exert his plant-wide seniority and replace any less senior employee in any department.

* * * * *

SECTION XXIX—TRANSFER, PROMOTIONS AND DEMOTIONS

> A. The Company may at its discretion transfer employees between jobs or shifts within a department. In case of a partial job abolishment, such as in the case where a significant part of the duties are abolished, and the main duties are combined with other new duties, a new rate will be established in accordance with the existing job evaluation plan. All questions concerning new races are subject to the grievance procedure as put forth in Section XXXI.

* * * * *

EXHIBIT C—LINES OF PROGRESSION

> Lines of progression are included in this contract for the sole purpose of indicating the promotional steps within a department. These exhibits in no way guarantee that the various classifications within any line of promotion will automatically be filled or that there will always be a definite number of employees in any given classification.

* * * * *

SUPPLEMENT IV—JOB EVALUATION PLAN

> It is hereupon agreed that: The present job evaluation plan is recognized as the only plan that will be used to classify all jobs performed by employees in the bargaining unit into pay classifications. A committee shall be appointed by the Company which will evaluate every job in the bargaining unit according to this plan. Present pay classifications shall prevail until said committee has completed its evaluations. At that time the evaluations and classifications recommended by the committee shall become effective immediately. Wage adjustments as determined by this committee shall become effective upon date of recommendation by the committee and shall not be considered for retroactive payment.
>
> Upon completion of evaluation by the committee, any job classification may be considered for re-evaluation according to the following procedure:
>
> > A formal request for re-evaluation shall be submitted by the employee to the Job Evaluation Administrator who shall be appointed by the Company. . . . The Job Evaluation Committee shall meet not less that [sic] once each month to review re-evaluation requests and render its decisions. Wage adjustments resulting from re-evaluation requests shall be retroactive to the date the request was submitted and received by the Job Evaluation Administrator. Such retroactivity shall not exceed thirty (30) calendar days.

There is no specific "management rights" clause in the contract.

In drawing the issues, the arbitrator first stated that the Union contends that Respondent's actions were a violation of the contract and noted:

> On or about February 29, 1980, the Union filed 8(a)(5) charges with the National Labor Relations Board. By letter of March 26, 1980, the Board declined to issue complaint, electing instead to defer to arbitration under *Collyer [Insulated] Wire*, 192 NLRB 837; *Spielberg Manufacturing*, 112 NLRB 1080 and their progeny.
>
> In this case, the unilateral change/refusal to bargain issue is the heart and soul of the grievance. The Union contends that the company's action was a flagrant violation of its duty to bargain.

Citing several labor arbitration cases, the arbitrator found that "[I]t is well settled that in the absence of an agreement to the contrary, the employer retains all of its traditional managerial rights . . . . This is true even where, as here, there is no specific management right clause." The arbitrator further found that on the basis of prior arbitration authority Respondent has the inherent right to create new job classifications, to eliminate other job classifications, and to distribute residual duties to other employees in the bargaining unit "[a]s long as such actions are not arbitrary, capricious or discriminatory . . . ." The arbitrator framed the issues before him as:

> (1) Whether the employer's actions were prohibited by the agreement and (2) whether said actions were arbitrary, capricious, discriminatory, or made in bad faith.

The arbitrator found, as General Counsel admits, there is no expressed prohibition in the contract of Respondent's actions; he further found that the action was not arbitrarily capricious or discriminatory. The arbitrator went on to say however:

> Sections XXVIII(D)(5) and XXIX(A) clearly indicate that the company has the unilateral right to abolish jobs and did not surrender that right at the bargaining table. These sections define the rights of employees and the procedures to be followed "in the event" or "in case" jobs are abolished.

Since he found that Respondent was not improperly motivated, he held that the Company's determination to abolish the fourth hand and beater helper classifications did not violate the collective-bargaining agreement. The arbitrator went on to hold that the establishment of duties for new classifications is reviewable by the indication of the grievance procedure in which the employee can seek reevaluation of his job and pay his pay rate.

The arbitrator found that while the Employer was not required to bargain over the new wage rates for the utility person job because of the mechanisms provided for review of the rates, Respondent did violate the contract because there was "no bargaining whatsoever concerning seniority, bumping rights, lines or promotion and regression, etc. of the new job." The arbitrator ordered the Company to bargain over the working conditions of the utility person classification.

The General Counsel contends that the Board should not defer to the decision of the arbitrator because the arbitrator used improper motive of analysis in appraising Respondent's actions. Citing *Alfred M. Lewis, Inc.*, 229 NLRB 757 (1977), the General Counsel argues in his brief, p. 6:

> The arbitrator found there was nothing in the contract which prohibited the Respondent's action and therefore he found no violation of the contract (Jt. Exh. 3, p. 9). This framework for analyzing the issues was directly opposite to the framework that should have been applied in accordance with Board law. Thus to analyze the unfair labor practice issue, the question was not whether there was anything in the contract which prohibited Respondent's action but whether there was a specific provision in the contract which permitted or allowed Respondent to take such action. The arbitrator failed to consider this issue . . . .

The General Counsel's citation of *Alfred M. Lewis* is correct. Arbitrators are required to decide if the unilateral action is permitted by the contract; if not, the unilateral action is a violation of Section 8(a)(5) of the Act. However, the General Counsel's statement that the arbitrator failed to consider this issue is incorrect. The arbitrator first and primarily looked to traditional arbitrator guidelines for the decision that there was no violation of the contract because there was nothing in the contract to prohibit Respondent's conduct; however, he also held that the language of the cited sections providing "in the event" or "in case" jobs are abolished provide the Company with the "unilateral right to abolish jobs."

Thus, the aribtrator specifically stated that he was considering the statutory issue; he did consider the statutory, albeit secondarily. It is not for the Board to substitute its judgment for interpretation of the contractual provisions for that of the arbitrator[4] even if the Board would have reached a different result if it had been considering the matter in the first instance.

Based on the above, and the record as a whole, I find that it will effectuate the policies of the Act to give conclusive effect to the grievance award, and, on that basis, and pursuant to Section 10(c) of the Act, I shall issue the following recommended:

ORDER[5]

The complaint is dismissed in its entirety.

---

[4] *Bay Shipbuilding Corporation*, 251 NLRB 809 (1980), and cases cited therein.

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.